STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matters of the Requests for Review of:

Norment Security Group, Inc. Cases No. 05-0128-PWH and 05-0130-PWH

From Assessments issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Norment Security Group, Inc. ("Norment") submitted timely requests for review of civil wage and penalty assessments issued by the Division of Labor Standards Enforcement ("DLSE") with respect to two public works projects: Integrated Personal Alarm System – North, Department of the Youth Authority (Core Area and DeWitt Nelson, O.H. Close and Karl Holton Youth Correctional Facilities) ("North" project) and Personal Alarm Upgrade, Department of the Youth Authority (N.A. Chaderjian Youth Correctional Facility) ("Chad" project). A Hearing on the Merits was conducted on January 31, 2006, in Sacramento, California before Hearing Officer Nathan D. Schmidt. Jordan J. Yudien appeared for Norment, and Ramon Yuen-Garcia appeared for DLSE. The parties presented testimony and exhibits and later filed post-hearing briefs. Now for the reasons set forth below the Director of Industrial Relations issues this decision modifying and affirming the Assessment.

SUMMARY OF FACTS AND PROCEEDINGS

In August 2001, Norment entered into a contract with the Department of General Services, Real Estate Services Division ("DGS") for the North project to install integrated personal alarm systems at three youth correctional facilities for a total cost of $5,225,000.00. On or about September 1, 2001, Norment entered into three separate subcontracts with Security Zone, Inc. ("Security Zone") on the North project to do electrical wiring and conduit work at the Core Area and DeWitt Nelson, O.H. Close and Karl Holton Youth Correctional Facilities, all located in Stockton, Calilfornia. Security Zone's certified payroll records ("CPRs") show

that eight of its employees, comprised of inside wiremen and communication and systems workers, worked on the North project between July 10, 2002 and January 22, 2003.

Norment entered into an additional contract with DGS in June 2002, for the Chad project to upgrade the personal alarm system at the N.A. Chaderjian Youth Correctional Facility in Stockton, California for a total cost of $938,000. Norment also subcontracted with Security Zone on the Chad project, entering into the subcontract on or about November 30, 2002. Security Zone's CPRs show that seven of its employees, comprised of inside wiremen and communication and systems workers, worked on the Chad project between November 4, 2002 and May 25, 2003.

The issue in this case is whether Security Zone's employees were paid the prevailing wages due under the applicable prevailing wage determinations, numbers SJO-2001-1 (North project), SJO 2002-1 and SJO-2002-2 (Chad project). The primary dispute in the case is whether Security Zone paid the required fringe benefits for its inside wiremen for the work completed through December 2002 and for its communication and systems workers through February 2003.

On or about June 13, 2003, three Security Zone employees complained that they had not been paid for hours they had worked on the Chad project in May 2003. Deputy Labor Commissioner Brenda Rogers subsequently conducted an investigation. As a result of this investigation, DLSE determined that Security Zone had failed to pay its employees the proper prevailing wages on the North and Chad projects. On this basis, DLSE issued Civil Wage and Penalty Assessments ("Assessments") for the North project on May 20, 2005 and for the Chad project on July 1, 2005. Norment filed Requests for Review of each Assessment on July 12, 2005 as provided by Labor Code section 1742.

At the first prehearing conference in this matter on September 21, 2005, the two requests for review were consolidated for hearing and decision. In addition, the parties stipulated that: (1) both projects were public works subject to prevailing wage requirements; (2) the Requests for Review were timely filed; and (3) the enforcement files were requested and produced in a timely fashion.

Deputy Labor Commissioner Martin Schmid testified that he replaced Brenda Rogers in October 2005 on these cases. Mr. Schmid testified that the Assessments had been issued when he took over the cases and that he had reviewed the files, but he had not conducted any further investigation. Based on his review of the investigation files, Mr. Schmid testified that the CPRs for both projects showed that all employees had been paid less than the required

prevailing wages for each week of both projects as shown on DLSE's Public Works Audit Worksheets. On cross-examination, Mr. Schmid acknowledged that the base hourly rate appeared to have been paid to all except a few employees. He explained that the CPRs did not reflect the payment of additional amounts required for fringe benefits and training fund contributions. Mr. Schmid noted that DLSE's audit of the North project had been amended on July 6, 2005, and on January 23, 2006, to credit training fund contributions, which the Division determined were paid and to correct the classification of one Security Zone's worker, Erik Trettevik, from Inside Wireman to Inside Wireman, Apprentice Level 3. This amendment reduced the Assessment for the North project by $7,291.31. As shown on its the Public Works Audit Worksheets, DLSE calculated that $19,113.12 in wages were owing on the North project and $44,343.47 in wages and $2,541.99 in training fund contributions were owing on the Chad project for a total of $64,998.58 owing on both projects.

On cross-examination, Mr. Schmid testified that he had reviewed a letter from the Electrical Workers Apprenticeship & Training Trust to Ms. Rogers, dated May 24, 2005, stating "that all benefits, including training fund contributions, were submitted by Security Zone for the months of July thru [*sic*] December 2002." The letter itemizes the training fund contributions paid for those months and states that no training fund contributions had been received for the hours reported by Security Zone for the months of January, February and March 2003. The letter concludes by stating:

> A check was received dated 4/30/03 for $12,408.84 for all contributions (Health & Welfare, Pensions, App. & Training, etc.) due for the January hours but was returned by the bank for non-sufficient funds. There is a note on the Administrator's delinquency report stating "Owners filed personal bankruptcy. The corporation was dissolved."

Mr. Schmid testified that it was typical for DLSE to inquire of the appropriate training fund whether the required contributions have been made, but that it does not normally contact health and welfare or pension funds to confirm whether those contributions have been made. He stated that the files did not indicate that such contacts had been made in these cases.

After reviewing the files, Mr. Schmid met with his supervisor, Senior Deputy Labor Commissioner Denise Padres, who has the discretion to determine the amount of penalties assessed per violation under Labor Code section 1775. Mr. Schmid noted that the previous supervisor had reviewed the penalty to be assessed with Ms. Rogers and determined that $50 per violation was appropriate. However, the previous supervisor had retired. Mr. Schmid testified that the files showed that Ms. Rogers had communicated with Norment in April 2004

but that no corrective action had been taken. In addition, Mr. Schmid testified that the CPRs for both projects demonstrated the underpayment of wages on their face because the total wages reported on the CPRs were less than the appropriate prevailing rates.

Senior Deputy Labor Commissioner Denise Padres testified that she had reviewed the files for both cases and had spoken with Mr. Schmid regarding the penalty assessments prior to the hearing on the merits. Ms. Padres testified that DLSE had determined that Security Zone's violations were willful and that the maximum penalty of $50.00 per violation under Labor Code section 1775 was appropriate, because the CPRs clearly showed that Security Zone's employees were not being paid the prevailing rate. Ms. Padres also noted that Norment had not attached copies of Labor Code sections 1771, 1775, 1776, 1777.5, 1813 and 1815 to its subcontracts with Security Zone as required by Labor Code section 1755(b)(1).

Patrick Fish, Norment's West Coast Office Operations Manager testified that he became Operations Manager in late 2002 when both the North and Chad projects were already in progress. Mr. Fish testified that, at the time the work was being done by Security Zone, he believed that the work could all be performed by communication and systems workers rather than inside wiremen because it was all low voltage work. He testified that he subsequently learned that there are distance limitations for the length of conduit that can be run by communication and systems workers that were exceeded on these projects.

Accepting the classifications reported by Security Zone and used by DLSE in its audits of the projects, Mr. Fish testified regarding the correct prevailing wages for the Security Zone employees on the two projects. According to charts which he had prepared for the hearing, all employees on the two projects had been paid at or in excess of the base hourly rates, exclusive of fringe benefits, required by the applicable prevailing wage determinations through April 2003. In all except three cases, the base hourly wage asserted by DLSE in its audits matched those in the applicable prevailing wage determinations as presented by Mr. Fish. One exception was the prevailing wage originally asserted by DLSE for Erik Trettevik who had been erroneously listed as an inside wireman on DLSE's original audit. As Mr. Schmid testified, this error was corrected on a revised audit which correctly identified Mr. Trettevik as an inside wireman apprentice level 3. The parties stipulated at this point that Mr. Trettevik would be treated as an apprentice level 3 for the purpose of both projects and agreed on the base hourly rate used by DLSE in the amended audit. The only remaining disputed hourly rate was that used by DLSE for the two communication and systems installer apprentice level 1s (Daniel Freitas and Brent Maynor) for their work on the Chad project. Mr. Fish

calculated a basic hourly rate of $11.65, while the DLSE audit used a basic hourly rate of $11.99.[1]

Mr. Fish conceded that none of the three Security Zone employees who worked on the Chad project in May 2003 (Sean Jackson, Roger Cozzi and Daniel Freitas) were paid by Security Zone for the hours they worked that month. Though he questioned the evidence for the hours claimed for Mr. Freitas, Mr. Fish based his calculation of the unpaid wages for Mr. Jackson and Mr. Freitas on the 128 unpaid hours for each employee cited by DLSE. He questioned the 100 unpaid hours that DLSE cited for Mr. Cozzi, however, noting that Mr. Cozzi's declaration executed on December 3, 2003, only claimed 88 unpaid hours for May 2003. Mr. Fish calculated that the unpaid wages for these three employees totaled $7,580..

Mr. Fish testified that, although they were not reported on the CPRs, Security Zone had paid the required fringe benefits, including training fund contributions, to the appropriate union trust funds through the end of December 2002. He stated that, according to his calculations, the fringe benefit payments made by Security Zone, but not reported on the CPRs, when added to the basic hourly rates reported on the CPRs, brought the wages paid to all Security Zone employees on the two projects equal to or in excess of the required prevailing wages through the end of December 2002. Mr. Fish did not, however, provide any charts or calculations demonstrating this at the hearing. Mr. Fish conceded that fringe benefits had not been paid for any Security Zone employees from January through May 2003 and that those amounts owed. Based on information received from Don Campbell, one of the trustees of the union benefits trust fund, for January, February and March 2003, Mr. Fish stated that $30,202.18 in benefits, including training fund contributions, was due for that period. In addition, based on DLSE's calculation of hours worked in April and May 2003, as recorded on the audit worksheets for the Chad Project, Mr. Fish calculated that an additional $6,457.94 was due in fringe benefits for that period.[2] Based on these calculations, Mr. Fish asserted that a total of $44,756.60 was due in unpaid wages and fringe benefits on the two projects (comprised of $7,580.24 in unpaid wages from May 2003 and $36,660.12 in fringe benefits and

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[1] Mr. Fish calculated the apprentice level 1 rate as $11.65 (55% of the journeyman rate of $21.19 as provided by prevailing wage determination numbers SJO-2002-1 and SJO-2002-2). The additional $0.34 in the $11.99 rate cited by DLSE appears to include the additional 3% of the basic hourly rate which the applicable prevailing wage determinations require to be added to the total hourly rate and the overtime hourly rate for the National Employee Benefit Board. Per DLSE's Exhibit 27, however, an Apprentice Wage Request for communication and systems installer, the correct basic hourly rate for apprentice level 1 is $11.65 and the additional 3% should be included as part of the pension benefit rather than added to the basic hourly rate.

[2] This calculation appears to include fringe benefits only and does not include training fund contributions due for that period.

training fund contribution from January through May 2003rather than the $64,998.58 calculated by DLSE.

Mr. Fish testified that he first became aware that Security Zone had underpaid or failed to pay some of its employees approximately 18 months after Security Zone went out of business in May 2003. He testified that Norment had no knowledge in either 2002 or 2003 that Security Zone was doing anything improper. He testified that Norment's project manager, Jake Dawson, had reviewed Security Zone's CPRs over the course of the project and that he had reported nothing unusual. Mr. Fish acknowledged, however, that though Mr. Dawson had experience in project management on public works projects, he had no experience or training with regard to prevailing wages. Mr. Fish testified that the basic hourly rate reported on the CPRs was generally higher than the applicable prevailing wages, however, and thus the CPRs looked fine. On cross examination, Mr. Fish conceded that the required Labor Code sections were not attached to the subcontracts between Norment and Security Zone, but stated that they were incorporated by reference.

Don Campbell, the Executive Director of the Northern California Chapter of the National Electrical Contractors Association (NECA), testified that he serves as a trustee of the benefits trust funds for the inside wiremen and communication and systems workers in this matter. He explained that there were separate collective bargaining agreements and benefits trust funds for the two classifications of workers. Mr. Campbell testified that Security Zone was obligated through a collective bargaining agreement to pay into the union benefits trust funds on behalf of its employees.

Mr. Campell testified that Security Zone was current on its fringe benefit payments for all employees on the North and Chad projects through the end of December 2002. With regard to the inside wiremen employees, he testified that a contractor under the inside wiremen collective bargaining agreement is required to submit a transmittal to the trust fund showing the hours worked by each employee and the fringe benefit amounts owed along with a check for the amount due. Even if the contractor is unable to pay, he is still required to submit the transmittal. Security Zone had submitted the transmittals and checks for the inside wiremen fund for July through December 2002. Mr. Campbell testified that Security Zone had submitted its January 2003 transmittal along with a check that was returned for non-sufficient funds and that it had submitted the inside wiremen fund transmittals without checks for February and March 2003.

Mr. Campbell testified that the trust fund attempted to collect from Security Zone for the unpaid inside wiremen fringe benefits for January through March 2003. It determined that the principals of Security Zone had filed for Chapter 7 bankruptcy and that the cost of recovering additional funds from Security Zone would be uneconomical. Mr. Campbell produced and authenticated copies of the inside wiremen transmittals submitted by Security Zone without payment for January, February and March 2003 and explained that the amounts payable to the inside wiremen benefits trust fund under the collective bargaining agreement include health and welfare benefits, both defined contribution and defined benefit pension contributions, vacation and union dues, training contributions and administrative costs. Mr. Campbell also provided an Employer Delinquency Report for Security Zone showing no unpaid fringe benefits as of the beginning of January 2003 and total fringe benefits owing of $30,202.18 as of March 30, 2003.

Mr. Campbell testified that even though Security Zone did not pay the required inside wiremen fringe benefit contributions for 2003, those employees did not suffer any detriment to their health and welfare or pension benefits because, under ERISA governed multi-employer health and welfare and pension plans such as this one, an employee is credited with the hours worked whether or not the contributions are actually made. Mr. Campbell testified that there is a five-year vesting period for the defined benefit portion of the pension under the inside wiremen collective bargaining agreement.

With regard to the communication and systems workers, Mr. Campbell produced transmittal forms for fringe benefit payments made on behalf of Brent Maynor for December 2002 and February 2003 and testified that the amounts reported for those two months had been paid by Security Zone.[3] At the time of the hearing, Mr. Campbell did not have any documentation regarding payments to the communication and systems benefits trust fund prior to December 2002 or on behalf of the other two communication and systems employees, Daniel Freitas and Sara Eydam. Mr. Campbell testified that the third-party administrator of the communication and systems benefits trust fund was still looking for records regarding earlier contributions and those on behalf of the other two employees.

The hearing was recessed to allow Mr. Campbell time to obtain additional documents, if any existed, regarding fringe benefit contributions made on behalf of the remaining com-

[3] The transmittal forms include a contribution of 3% of gross earnings to National Employee Benefit Fund (NEBF) as a separate line item. As noted in footnote 1, above, DLSE had apparently added this contribution to the basic hourly rate for communication and systems apprentice level 1 to arrive at the figure of $11.99 per hour as opposed to the figure of $11.65 per hour specified in Exhibit 27.

munication and systems workers. Eight additional pages of documents from NECA regarding fringe benefit contributions for Brent Maynor and Sara Eydam from August 2002 through February 2003 were submitted to the Hearing Officer and DLSE on March 20, 2006. No records were submitted regarding Daniel Freitas. At a telephonic status conference held on March 28, 2006, the additional documents were added to existing Exhibit V. The parties stipulated that, had he been called, Don Campbell's testimony regarding the authenticity and content of the additional documents would have been identical to his testimony regarding the original documents comprising Exhibit V at the first day of the Hearing on the Merits.

On May 24, 2006, Norment submitted additional transmittal forms documenting Security Zone's fringe benefit payments for its inside wiremen employees for July through December 2002. DLSE stipulated to the admission of these documents as genuine business records via e-mail on May 25, 2006 and they were admitted as Exhibit T-2.

Norment contends that Security Zone had paid all required fringe benefits for its inside wiremen employees through December 2002 and for its communication and systems employees through February 2003, "the last time SZ employed an s&c worker on either of the two projects."[4] Consequently, Norment contends that all of Security Zone's employees on the North and Chad projects were paid at or in excess of the applicable prevailing wages through at least the end of December 2002. Norment concedes, however, that fringe benefit payments are owed for inside wiremen employees for the months of January through May 2003 and that, in addition, unpaid wages are due to three Security Zone employees who worked on the Chad project in May 2003. Based on a spreadsheet attached to its Post-Trial Brief, Norment calculates the unpaid fringe benefits and back wages to total $32,044.94 for both projects in 2003 and contends that it should get credit against that amount for $10,654.77 that Security Zone paid its employees in excess of the required prevailing wages in 2002.

Norment attacks the penalty determination under Labor Code section 1775 on the ground that DLSE has not proven either that Norment "had knowledge" of Security Zone's underpayment of wages in 2002 or 2003 or that it failed to satisfy the requirements of Labor Code section 1775(b). Alternatively, Norment argues that if a penalty is to be assessed, it should be the minimum penalty of $10.00 per violation per day rather than the maximum of $50.00. With regard to liquidated damages under Labor Code section 1742.1, Norment contends that liquidated damages should be waived because it had substantial grounds for believing the Assessments to be in error and that, in fact, the Assessments were in error.

[4] Norment forgets communication and systems apprentice level 1 Daniel Frietas, however, who worked on the Chad project in April and May 2003 and for whom there is no record of fringe benefits having been paid.

DLSE contends that Norment should receive no credit for the fringe benefit payments allegedly made by Security Zone to the union trust funds for four reasons: (1) there is no evidence that any payments were made for the communication and systems installers; (2) there is no evidence that any payments made by Security Zone to the union trust funds were for the North or Chad projects; (3) Norment's calculations do not take into account the fact that deductions were made from the workers' gross wages; and (4) the computation assumes that the workers "in fact received the benefits under their plans."

DISCUSSION

Labor Code sections1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction contracts. Specifically:

> The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*].) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Labor Code section 90.5(a), and *see Lusardi, supra.*)

Labor Code section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Labor Code section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a civil wage and penalty assessment under Labor Code section1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to Labor Code section 1741. An

affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under Labor Code section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

1. Norment Is Entitled To Credit For The Fringe Benefit Payments Made To The Union Trust Funds By Security Zone.

The primary dispute in this case is whether Norment should receive credit for fringe benefit payments purportedly made to the applicable union trust funds by Security Zone; and, if so, whether those payments satisfy Security Zone's prevailing wage obligations through the end of December 2002. For the reasons discussed below, Norment is entitled to receive credit to the extent that fringe benefit payments to the union trust funds have been documented.

Labor Code section 1773.1, defines "per diem wages" both for purposes of establishing prevailing wage rates and for crediting employer payments toward those rates provides in pertinent part as follows:

> (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.
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> (b) Employer payments include all of the following:
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> (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
>
> (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.
>
> (3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.
>
> (c) * * *

DLSE contends that there is no evidence that communication and systems workers actually received any benefits, other than transmittals showing that work was performed for the months of August 2002 through February 2003. DLSE further argues that, even if pay-

ments were made, there is no evidence that they were made for either the North or Chad project. However, Don Campbell specifically testified that fringe benefit payments for all Security Zone employees were current through the end of December 2002. While he explained that there were two separate trust funds, Mr. Campbell did not testify that only one group was current through December 2002. In fact, when asked, Mr. Campbell testified that the two transmittals he produced for communication and systems employee Brent Maynor, including one for February 2003, indicated that benefits had been paid. The transmittals for the two trust funds and Mr. Campbell's testimony regarding them constitute substantial evidence that fringe benefits were paid through December 2002 for inside wiremen and through February 2003 for communication and systems workers. While DLSE correctly points out that the August 2002 communication and systems benefit trust fund transmittal form reports 24 hours for Communication and System Installer Sara Eydam when she was not working on North project according to the CPRs, the total number of hours reported to the trust fund for Ms. Eydam for August and September 2002 is 92: the same number of hours reported worked by Ms. Eydam on the North project according to the September CPRs submitted by Security Zone. While the time period for this work reported to the trust fund does not exactly mesh with the CPRs, the fact that exactly the same number of hours was reported for this employee in both places indicates, in the absence of evidence to the contrary, that it is the same work.[5]

DLSE's next argument is that no credit should be given to Norment for contributions to the communication and systems trust fund because it was a defined contribution plan and there is no evidence that any of the workers received a distribution from the plan when Security Zone went out of business. First, this misstates Mr. Campbell's testimony and the content of the trust fund transmittal documents. Mr. Campbell did not testify that the communication and systems worker's plan was a defined contribution plan. Rather, he testified that the inside wiremen's pension plan included both defined contribution and defined benefit components. The transmittal documents for that plan make the two components clear as there are separate line items for "Money Purchase" and "Local Pension" contributions. Further, because this is a multi-employer union plan, termination of employment with one signatory employer would

[5] The same is true for work done by Inside Wireman Mark Jines in the same time period. The August transmittal to the inside wiremen benefit trust fund reports eight hours for Mr. Jines which do not appear on the August CPRs for the North project, yet the total hours reported to the trust fund for Mr. Jines in August and September is 136, which matches the number of hours reported for him on the September CPRs.

not constitute termination from membership in the plan and would not trigger a distribution.

DLSE's argument that the five-year vesting requirement for the defined benefit component of the inside wiremen's plan constitutes forfeiture of contributions is no more compelling. As explained above, Mr. Campbell testified only that the defined contribution portion of the inside wiremen's pension plan had a vesting period. As above, it is crucial to note that this is a multi-employer ERISA plan. There is no evidence that any benefits would be or were forfeited. On the contrary, this is precisely the sort of plan which qualifies for credit under Labor Code section 1773.1(b) (1) as "the rate of contribution irrevocably made by the employer to a trustee or third party *pursuant to* a plan, fund, or program." Mr. Campbell testified that the funds are subject to ERISA. Norment is entitled to credit for Security Zone's contributions to the plan so long as those contributions were made pursuant to the plan, and there was a connection between the plan and the project employees on whose behalf the contributions were made. In ERISA terms, the necessary connection between the plan and the project employees is shown by establishing that the workers are "participants" or "beneficiaries" in the plan within the meaning of 29 United States Code sections 1002(7) or (8). ERISA requires plans, funds, or programs to be for the sole benefit of participants and beneficiaries, which is the same as the "benefits to workers" requirement found in Labor Code section 1773.1(b) (2), pertaining to self-funded non-ERISA plans or programs. There is no evidence that this requirement is not satisfied by the union trust funds that covered Security Zone's employees.

Finally, DLSE simply states, without explanation or precedent, that Security Zone's statutory deductions from its employees' wages for taxes and social security, which were reported on the CPRs, would result in a "double credit" if credit were given for the documented fringe benefit payments which were not reported on the CPRs. As no connection has been shown between the two types of deductions, whether reported on the CPRs or not, the reporting of statutory deductions does not constitute a ground to deny credit for documented fringe benefit payments.

Therefore, Norment is entitled for credit for Security Zone's documented fringe benefit and training fund payments to both the inside wiremen and communication and systems funds through the end of December 2002 and to the communication and systems fund for

January and February 2003.

As summarized in the following table, review of the CPRs and DLSE's audit worksheets for each project along with the transmittal forms to the inside wiremen union benefit trust funds establishes that all inside wireman employees on both projects, with the exception of Erik Trettevik, were paid in excess of the full prevailing wages due them from July through December 2002. The lone exception, Erik Trettevik, is owed $60.14 for hours worked on the North project in September 2002.

Employee	**Prevailing Wages Required Per DLSE Including Fringes**	**Wages Paid Including Fringe Benefits**	**Wages Due**	**Training Fund Contributions Due**
Sean Jackson	$32,480.17	$40,163.29	$0.00	$0.00
Elliot Willard	$30,995.44	$34,816.75	$0.00	$0.00
Erik Trettevik	$16,333.03	$16,272.89	$60.14	$0.00
Roger Cozzi	$22,009.65	$24,952.53	$0.00	$0.00
Mark Jines	$4,949.04	$5,766.00	$0.00	$0.00
James Archuleta	$14,232.22	$15,880.38	$0.00	$0.00

The same records establish that Security Zone paid all inside wiremen training fund contributions due for that period, as has already been acknowledged by DLSE.

Norment remains liable, however, for unpaid fringe benefit and training fund contributions due for Security Zone's inside wireman employees for January through May 2003 and for unpaid wages owed to Roger Cozzi and James Archuleta for hours worked in May 2003. Review of the CPRs, DLSE's audit worksheets and the questionnaires and declarations of workers establishes that the wages and training fund contributions summarized in the following table are due to Security Zone's inside wireman employees on each project for January

through May 2003.

Employee	Prevailing Wages Required Per DLSE	Wages Paid	Wages Due	Training Fund Contributions Due
Sean Jackson	$21,996.50	$12,953.54	$9,042.96	$681.36
Elliot Willard	$11,808.00	$8,118.72	$3,689.28	$365.76
Erik Trettevik	$6,027.41	$3,735.50	$2,291.91	$306.07
Roger Cozzi	$19,684.12	$11,078.67	$8,605.45	$610.07
James Archuleta	$7,554.27	$4,696.50	$2,857.77	$384.01

Similarly, as summarized in the following table, review of the CPRs, DLSE's audit worksheets and the transmittal forms to the communication and systems union benefit trust fund establishes that the two communication and systems employees working on each project were paid in excess of the full prevailing wages due them from August 2002 through February 2003. The record establishes that the training fund contributions for those employees were also fully paid during the same period. The CPRs, DLSE's audit worksheets and the questionnaires and declarations of communication and systems employee Daniel Freitas, however, establish that Norment remains liable to Daniel Freitas for unpaid fringe benefits and training fund contributions due for April and May 2003 and for unpaid wages for hours worked in May 2003 on the Chad project.

Employee	Prevailing Wages Required Per DLSE Including Fringes	Wages Paid Including Fringe Benefits	Wages Due	Training Fund Contributions Due
Sara Eydam	$2,313.80	$2,547.09	$0.00	$0.00

Brent Maynor[6]	$9,887.79	$11,012.28	$0.00	$0.00
Daniel Freitas[7]	$3,816.40	$1,781.52	$2,034.88	$139.20

Therefore, Norment's total liability for unpaid wages and training fund contributions for all employees is $31,068.86, with $197.78 attributable to the North Project and $30,872.08 attributable to the Chad project.

2. Norment is Liable for Penalties Assessed under Labor Code Section1775.

Labor Code section 1775(a) states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.
>
> (ii) The penalty may not be less than twenty dollars ($20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

[6] The correct basic hourly rate for Communication and System Apprentice Level 1 is $11.65 per hour for the Chad project. That rate is used here rather than the $11.99 per hour used by DLSE in its audit.
[7] See footnote 6, above.

(iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[8]

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." Code of Civil Procedure section 1094.5(b). In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal.Code Reg. tit. 8 §17250(c)].)

The testimony of Mr. Schmid and Ms. Padres shows that they properly considered whether there was a good faith mistake that was promptly corrected and whether the violations were willful. In this case, it is apparent that Security Zone's violations were willful and not good faith mistakes. While Security Zone may have paid the required fringe benefits and training fund contributions that were due for July though December 2002 directly to the union benefit trust funds, the CPRs that it submitted for that period were inaccurate because the amounts due for those contributions were not reported in the appropriate spaces (those labeled "VAC/HOL," "HEALTH & WELF," "PENSION," "TRAING," etc.) on the CPRs. With regard to January through May 2003, not only were the CPRs submitted by Security Zone inaccurate, but, with the sole exception of communication and systems apprentice Brent Maynor, Security Zone completely failed to pay any fringe benefits or training fund contributions for that period and failed to pay any wages at all to three of its employees for hours worked in May 2003. Consequently, there was no basis for a reduction of the maximum penalty amount of $50 per violation.

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[8] Labor Code §1777.1(c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

Because penalties under section 1775 are subject to joint and several liabilities, Norment is liable for the full penalties that were assessed upon Security Zone unless it can establish that it is entitled to relief from those penalties under Labor Code section 1775(b). Section 1775(b) can allow a general contractor to escape joint and several liabilities for penalties assessed under Labor Code section 1775(a) if certain factors are met. Subdivision (b) provides in pertinent part that:

> If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:
>
> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
>
> (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
>
> (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

To escape liability under this subdivision, the general contractor must have had no knowledge that the underpayments were occurring, and it must comply with the specified requirements in subdivisions (b) (1)-(4). While it is clear that Norment should have realized that there was a problem, there is no evidence that it had actual knowledge of Security Zone's underpayments commencing in January 2003. The question is whether Norment met the other performance standards. Contrary to Norment's contention that it is entitled to relief under section 1775(b) unless DLSE proves that it failed to satisfy all four of the performance standards, the correct reading of the relevant language, "unless the prime contractor fails to

comply with all of the following requirements," is that the burden is on the contractor to show that it did in fact satisfy all four requirements. In other words, failure to satisfy any one of the enumerated requirements will deny the contractor relief under this section.

In this case, Mr. Fish has admitted that Norment did not satisfy subdivision (b) (1), because it failed to attach copies of the required statutes to its subcontracts with Security Zone. Mr. Fish argued that Norment had incorporated the statutes by reference, and thus should be considered in compliance, but the plain language of subdivision (b) (1) states that actual copies of the statutory language must be included in the subcontract. With its admitted failure to satisfy subdivision (b) (1), Norment cannot establish that it is entitled to relief from penalties under Labor Code section 1775(b). Therefore, Norment is jointly and severally liable for the full penalties assessed on Security Zone under section 1775.

3. Norment is Liable for Liquidated Damages on One Project, but not on the other.

Labor Code section 1742.1(a) provides in pertinent part as follows:

> After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., the affected contractor, subcontractor, and surety ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, which still remain unpaid. If the assessment ... subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment . . . to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg. *tit. 8* §17251(b)] states as follows:

> To demonstrate "substantial grounds for believing the Assessment . . . to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment . . .

In accordance with the statute, Norment would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessments. Entitlement to a waiver of liquidated damages in this case is closely tied to Norment's position on the merits and specifically whether there was an "objective basis in law and fact" for contend-

ing that the Assessments were in error.

Norment has shown an "objective basis in law and fact" for contending that the Assessment on the North project was in error, by establishing that Security Zone did in fact pay virtually all of the required fringe benefits and training fund contributions on that project to the union benefit trust funds, though it failed to report them on the CPRs. As a result, the prevailing wages owing on that project have been reduced from $19,113.12 to $196.78. Consequently, Norment is not liable for liquidated damages on the North project.

Norment has not, however, shown an "objective basis in law and fact" for contending that the Assessment on the Chad project was in error. While Norment has shown that Security Zone did in fact pay fringe benefits and training fund contributions for work done on the Chad project by inside wiremen through December 2002 and for work done on the project by communication and systems worker Brent Maynor in January and February 2003, Norment has not taken any action to pay the unpaid fringe benefits and wages which it admits are due for the majority of the work performed on the Chad project in 2003. The mere fact that the Assessment has ultimately been reduced does not constitute "substantial grounds for believing the Assessment . . . to be in error" when Norment took no action to pay admittedly unpaid wages due on the Chad project during the 60 day period following service of the Assessment. Accordingly, there can be no waiver and Norment's liability for liquidated damages in an amount equal to the remaining unpaid wages and fringe benefits on the Chad project is affirmed.

FINDINGS

1. Affected contractor Norment Security filed timely Requests for Review of the Civil Wage and Penalty Assessments issued by DLSE with respect to North and Chad projects.

2. The basic hourly rate for communication and systems apprentice level 1 on the Chad project is $11.65 per prevailing wage determinations numbers SJO-2002-1 and SJO-2002-2.

3. The parties stipulate that Erik Trettevik was an Inside Wireman Apprentice Level 3 at all times relevant to the Assessments.

4. Security Zone made all required fringe benefit payments, including training fund contributions, to the applicable union trust funds for both its inside wiremen and communication and systems workers from July through December 2002, fully satisfying its prevailing wage obligations for that time period, with the sole exception of $60.14 owed to inside wireman apprentice Erik Trettevik for hours worked in September 2002. In addition, Security Zone made the required fringe benefit payments for the hours worked by communication and systems apprentice Brent Maynor in January and February 2003. Norment is entitled to credit for these payments.

5. Security Zone failed to make required fringe benefit contributions for any of its inside wiremen employees from January through May 2003 and failed to make required fringe benefit contributions for communication and systems apprentice Daniel Freitas for April and May 2003.

6. Security Zone failed to pay inside wiremen Sean Jackson and Roger Cozzi for 128 hours and 88 hours respectively worked on the Chad project in May 2003 and failed to pay communication and systems apprentice Daniel Freitas for 128 hours worked in May 2003.

7. In light of Findings 4, 5 and 6, above, the net amount of wages, including training fund contributions, due under the North Assessment is $196.78 and the net amount of wages, including training fund contributions, due under the Chad Assessment is $30,872.08.

8. In light of Finding 7, above, the potential liquidated damages due under the Assessment on the North project is $196.78. Having established that Security Zone had paid nearly all of the required fringe benefits and training fund contributions on this project, Norment has demonstrated that it had substantial grounds for believing that the Assessment on the North project was in error. Accordingly, Norment is not liable for liquidated damages on the North project.

9. In light of Finding 7, above, the potential liquidated damages due under the Assessment on the Chad project is $30,872.08. No part of these back wages was paid within 60 days following service of the Assessment and Norment has not demonstrated that it had substantial grounds for believing the Assessment of these remaining wages to be in error. Accordingly, Norment is liable for liquidated damages on the Chad project in the amount of

$30,872.08 under Labor Code section 1742.1(a).

10. The Division did not abuse its discretion in setting the penalty for these violations at the rate of $50.00 per violation for 3 violations on the North project and 254 violations on the Chad project, for a total of $12,850.00 in penalties under Labor Code section 1775(a).

11. The amounts found remaining due in the Assessments as modified and affirmed by this Decision are as follows:

Wages Due:	$31,068.86
Liquidated Damages Due under Labor Code section 1742.1:	$30,872.08
Penalties under Labor Code section 1775(a):	$12,850.00
TOTAL:	$74,790.94

*In addition, interest is due and shall continue to accrue on all unpaid wages as provided in Labor Code section 1741(b).

ORDER

The Civil Wage and Penalty Assessments are modified and affirmed as set forth in the above Findings. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 20 Feb 09

John M. Rea
Acting Director of Industrial Relations